United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 31, 1995

TO : Peter W. Hirsch, Regional Director
Region 4

FROM : Robert E. Allen, Associate General Counsel
Division of Advice

SUBJECT: Dobbs International Services, Inc.
(HERE, Local 274)
Cases 4-CA-23202; 4-CB-7337

These Section 8(a)(1) and (3) and 8(b)(1)(A) and (2) cases were submitted for advice on violations under Beck,[1] and Paramax.[2]

In June 1994, the parties agreed to an initial bargaining agreement containing a union-security clause requiring "membership in good standing" as a condition of employment. The clause also provided that the Employer would discharge an employee 72 hours after receiving notice from the Union that the employee "failed to acquire, or thereafter maintain membership in the Union...and, further that the employee has had notice and opportunity to make all dues or initiation fee payments."

Charging Party Johnson has been employed since February and is not a Union member. On a few occasions in early October, the Employer advised Johnson that she had to "join the Union" or "sign for the Union" or she would be terminated. Finally, on October 10, the Employer discharged Johnson and provided her with a copy of a letter from the Union to the Employer, dated September 30. The Union's letter demanded that the Employer terminate within 72 hours all employees who had not paid the "initiation dues and fees required..."

Johnson asserts that, in her prior conversations with the Employer, she was told that her obligation was either to "join the Union" or "sign for the Union." The Union alleges that the September 30 letter to the Employer, which requires only the payment of initiation fees and dues, had been posted on the bulletin board for all employees to read. However, two employee witnesses disagree over whether that

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[1] CWA v. Beck, 487 U.S. 735 (1988).

[2] IBEW Local 444 (Paramax Systems Corp.), 311 NLRB 1031 (1993).

letter was posted before or after Johnson's termination on October 10.

We conclude, in agreement with the Region, that the Union violated Section 8(b)(1)(A) by maintaining an ambiguous "membership in good standing" union-security clause without also explaining that the only lawful condition required is the payment of dues and initiation fees. We conclude that the Union's duty to clarify the ambiguity of the union-security clause under Paramax was not adequately fulfilled by the mere posting of the September 30 letter.

Prior to Paramax, the Board had long held that a union has a fiduciary duty to inform unit employees of their obligations under a valid union-security agreement, including the correct particulars of any dues owing and the consequences of nonpayment. [3] The union must, at a minimum, give the delinquent employee "reasonable notice of a delinquency, including a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the method used in computing such amount." [4] In addition, the union must specify when payments are to be made and make it clear to the employee that discharge will result from failure to pay.[5] This fiduciary responsibility to advise an employee regarding his or her union-security obligations requires "positive action" by the union, without regard to any concurrent obligation on the employer to provide such notice.[6]

In the instant case, the September 30 letter was from the Union to the Employer, and not from the Union to the affected employees. Moreover, there is no evidence that it was the Union, rather than the Employer, who eventually posted that letter.[7] In any event, the posted letter would

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[3] Philadelphia Sheraton Corp., 136 NLRB 888 (1962), enfd. 320 F.2d 254 (3d. Cir. 1963).

[4] Teamsters Local Union No. 122 (August A. Busch & Co. of Mass., Inc.), 203 NLRB 1041, 1042 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974).

[5] Western Publishing Co., Inc., 263 NLRB 1110, 1112 (1982).

[6] Jo-Jo Management Corp., d/b/a Gloria's Manor Home for Adults, 225 NLRB 1133, 1143 (1976), enfd. 556 NLRB 558 (2d. Cir. 1977).

[7] See Teamsters, Local 856 (Fairmont Hotel), Case 20-CB-8167, Advice Memorandum dated May 2, 1991, at page 14.

not constitute "reasonable notice" since it was posted many months after the parties had agreed to the ambiguous union-security clause, and possibly even after Johnson had been discharged for noncompliance.

We further conclude, in agreement with the Region, that the Union's admitted failing to advise nonmember employee Johnson of her Beck rights also violated Section 8(b)(1)(A).[8] Finally, the Union violated Section 8(b)(2) by causing the Employer to discharge Johnson without providing her with either an explanation of the Paramax provision or notice of her Beck rights.

With regard to the alleged Section 8(a)(3) violation, we conclude initially that the Region should not allege that the Employer unlawfully entered into or maintained the ambiguous Paramax clause. In Paramax, the Board held that the clause was ambiguous because, "although the clause is capable of a lawful construction, it can also be interpreted as requiring more from Paramax unit employees than is imposed by statute." Id at 1037. The Board explicitly rejected the General Counsel's argument that the clause is unlawful on its face.[9]

We conclude that, since the Paramax clause here did not "explicitly require that employees bear obligations other than those lawfully imposed under Section 8(a)(3),"[10] the Employer was entitled to rely on the facial legality of such a clause. Thus, the Employer's entering into and maintenance of the contract containing this clause did not violate the Act. Further, since an employer is under no fiduciary duty comparable to a union's duty of fair representation, the Employer here was under no obligation to explain the ambiguity in this clause to its employees, and its failure to do so did not violate the Act.

We also conclude that the Employer did not violate Section 8(a)(3) because it complied with the Union's request to discharge Johnson in circumstances where the Union had not complied with Beck. Although a union violates Section

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[8] See G.C. Memorandum 88-14, "Guidelines concerning CWA v. Beck," dated November 15, 1992.

[9] Id. The Board relied upon NLRB v. News Syndicate Co., 365 U.S. 695, 699 (1961), in which the Court concluded that, "[i]n the absence of provisions calling explicitly for illegal conduct, [a] contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives."

[10] Paramax, supra, at 1037.

8(b)(2) by requesting a union-security clause discharge where it has failed to satisfy its Beck obligations, an employer does not violate Section 8(a)(3) by effecting such a requested discharge, unless the employer has reasonable grounds to believe, prior to the discharge, that the union did not comply with Beck.[11] Only where an employer has reasonable cause to believe that a union's request for discharge is improper is the employer under an affirmative duty to investigate the propriety of the request before acting upon it.[12]

In this case, there is no evidence that the Employer had any reason for believing that the Union's request for Johnson's discharge was improper under Beck, i.e., that the Union had failed to earlier to provide nonmember Johnson with the proper initial Beck notice.

On the other hand, we conclude, in agreement with the Region, that the Employer did violate Section 8(a)(3) when it discharged Johnson expressly because she refused to "join the Union" or "sign for the Union."

An employer violates 8(a)(1) if it notifies an employee that he or she is required to become a member of the union, and indicates that something other than the payment of regular dues and initiation fees is required.[13] This is a violation even if the collective-bargaining agreement

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[11] See Forsyth Hardwood Co., 243 NLRB 1039, 1040 (1979); Conductron Corp., a subsidiary of McDonnell Douglas Corp., 183 NLRB 419, 427 (1970).

[12] Western Publishing Co., 263 NLRB 1110, 1113 (1982) (when the employer has notice or sufficient reason to suspect that the union has failed to provide an adequate delinquency notice to an employee, the employer has a duty to investigate the circumstances surrounding the request for discharge before honoring it); Hemsley-Spear, Inc., 275 NLRB 262, 268 (1985); Valley Cabinet & Mfg., Inc., 253 NLRB 98, 99 (1980), enfd. 111 LRRM 2423 (9th Cir. 1982); R.H. Macy & Co., Inc., 266 NLRB 858, 859 (1983); Allied Maintenance Company, 196 NLRB 566, 571 (1972).

[13] See United Stanford Employees, Local 680 (Leland Stanford Junior University), 232 NLRB 326, n. 1, 328-329, 333 (1977) (new employees unlawfully told that they had to become members of the union and that "membership" included the signing of a membership card and the taking of a membership oath, in addition to the payment of fees and dues).

requires only the payment of agency fees, and the employee had access to that agreement.[14]

However, an employer that discharges or a union that seeks to discharge an employee for failure to comply with the dues obligations of union membership does not violate the Act. [15] And, where a union informs an employee that he or she must become a "member," and neither the statement itself nor its context suggests that what is being required is something other than the payment of regular dues and the initiation fee, there is no violation.[16] Thus, as the Supreme Court stated in NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963):

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.

In the instant case, we conclude that the Employer violated Section 8(a)(3) by terminating Johnson because she refused to comply with the Employer's unlawful demands that she "join the Union" or "sign for the Union," because those demands and their context would reasonably have suggested to Johnson that what was being required was something other than the payment of regular dues and initiation fees. The Employer never indicated to Johnson that she could satisfy her union-security obligations without joining the Union as a full member and could instead simply pay periodic dues and

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[14] Id. at 329.

[15] NLRB v. General Motors Corp., 373 U.S. 734 (1963).

[16] See I.B.I. Security, Inc., 292 NLRB 648, 649, 655-56 (1989) (distinguishing Hershey Foods, where the discharged employee had continued to tender dues, despite his resignation from membership, so that it was reasonable to infer that the union was improperly seeking discharge for reasons other than non-payment of dues). The Board in I.B.I. upheld, without discussion, the ALJ's finding that the statements that the employee must become a "member" did not themselves violate the Act. This is consistent with Leland Stanford, supra, in that the statements in I.B.I. would not reasonably have been understood to require anything more than the payment of union dues and initiation fees. See also Big Rivers Electric Corp., 260 NLRB 329, 331, n. 3, n.5, 334 (1982).

the initiation fee.[17] Therefore, in the context of the Employer's statements, particularly the ambiguous language of the Paramax union-security clause, Johnson would reasonably believe that there were no alternatives to full Union membership. Accordingly, the Region should allege a Section 8(a)(3) violation only insofar as the Employer discharged Johnson expressly because she refused to agree to "join the Union" or "sign with the Union."

R.E.A.

[17] The Region should not argue that employers are obligated to specifically inform nonmembers that under a contractual union-security clause, they are only required to pay dues and initiation fees. Instead, the Region should argue that in this case all the Employer's statements in the absence of any statements to the contrary would reasonably indicate to Johnson that she had to become a full Union member or at least that something other than payment of dues and initiation fees was required.